Supreme Court, U.S.
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Nº. 98-1434

In The
Supreme Court of The United States
October Term 1998

ROBERT LEE BACOTE,
Petitioner,

v.

THE STATE OF SOUTH CAROLINA,
Respondent.

On Writ Of Certiorari
To The Supreme Court of
South Carolina

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

AMIE L. CLIFFORD, Esquire*
Assistant Solicitor

BRENT ALAN GRAY, Esquire
Deputy Solicitor

Office of the Solicitor
300-B California Avenue
Moncks Corner, SC 29461
843-719-4529

Attorneys for Respondent
**Counsel of Record*

APPELLATE ADVANTAGE
P. O. BOX 7506 ◆KANSAS CITY, MO 64116◆816-453-2424

14 pp

COUNTERQUESTION PRESENTED

DOES AN ADMINISTRATIVE RULING REVERSING THE AUTOMATIC SUSPENSION OF A DRIVER'S LICENSE FOR REFUSAL TO SUBMIT A BREATH SAMPLE COLLATERALLY ESTOP THE PROSECUTION FROM USING EVIDENCE OF THE REFUSAL IN A SUBSEQUENT CRIMINAL PROSECUTION FOR DRIVING UNDER THE INFLUENCE?

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The Respondent, State of South Carolina, prays that the Petition to review the judgment of the Supreme Court of South Carolina in the above-styled case be denied.

CITATION TO OPINION BELOW

The Respondent accepts the Petitioner's version cited in the Petition for Writ of Certiorari.

JURISDICTION

Opinion Number 24794 of the Supreme Court of South Carolina was filed on June 1, 1998. On September 10, 1998, the Supreme Court of South Carolina denied Petitioner's request for rehearing and said order is reproduced in Petitioner's appendix pp. 14. This Court's jurisdiction is invoked pursuant to §28 U. S. C. 1257(a).

STATUTORY PROVISIONS INVOLVED

The Respondent accepts the Petitioner's version cited in the Petition for Writ of Certiorari.

RESPONDENT'S COUNTERSTATEMENT OF THE CASE

On June 26, 1994, Robert L. Bacote (Petitioner) was operating a motor vehicle on a roadway in Hanahan, South Carolina. Sergeant Tracy Roberts of the Hanahan Police Department observed Petitioner cross the center line twice. Officer Roberts stopped the Petitioner. As the Petitioner exited his vehicle, the officer noticed Petitioner was unsteady and holding the side of the car. The officer also noticed an odor of alcohol about the Petitioner. Following the administration of three field sobriety tests, Sergeant Roberts arrested Petitioner and charged him with Driving Under the Influence, Third Offense. The Petitioner was subsequently offered a breath test by Officer Michael R. Kirkley. After being advised of his options under the implied consent statute, Petitioner refused a breath test.

The Petitioner was indicted for Driving Under the Influence, more than first offense, on September 7, 1994.

An administrative hearing was scheduled by the South Carolina Department of Public Safety on December 12, 1994 to address the Petitioner's challenge to the automatic suspension of his driver's license resulting from his refusal to submit a breath sample. The arresting officer failed to appear at the administrative hearing and, therefore, the hearing officer rescinded the automatic suspension of the Petitioner's driver's license.

Petitioner's case was called for trial on October 18, 1995 before the Honorable B. Hicks Harwell. The trial court heard the Petitioner's motion to suppress the refusal of the breath test in a pre-trial hearing. Over the State's objection, the trial court granted the Petitioner's motion based upon the administrative officer's decision. The State appealed that decision.

The South Carolina Court of Appeals reversed the trial court's decision in an opinion issued on February 6, 1997. Petitioner filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* with the Court of Appeals on February 20, 1997. The Petition was denied on March 19, 1997.

The Petitioner then filed his Petition for Writ of Certiorari with the Supreme Court of South Carolina on April 15, 1997. The Petition was granted on December 5, 1997. Oral arguments were presented to the Supreme Court of South Carolina on April 21, 1998. On June 1, 1998, the Supreme Court of South Carolina affirmed the decision of the South Carolina Court of Appeals and, on September 10, 1998, denied the Petitioner a rehearing.

REASONS FOR DENYING THE WRIT

THE PROSECUTION IS NOT COLLATERALLY ESTOPPED FROM INTRODUCING EVIDENCE OF THE REFUSAL TO SUBMIT A BREATH SAMPLE IN A CRIMINAL PROSECUTION FOR DRIVING UNDER THE INFLUENCE DESPITE A PRIOR ADMINISTRATIVE RULING REVERSING THE AUTOMATIC SUSPENSION OF A DRIVER'S LICENSE BECAUSE OF THAT REFUSAL.

In deciding the instant case, the Supreme Court of South Carolina reaffirmed its position finding that collateral estoppel may only apply when parties have had the opportunity to fully litigate an issue. State v. Bacote, 331 S.C. 328, 503 S.E.2d 161 (1998). No hearing was ever held to determine the validity of Petitioner's refusal to submit to a breath analysis test. Id., 503 S.E.2d at 162. The administrative order rescinding the Petitioner's driver's license was a default order issued without benefit of a hearing. Id. The Bacote opinion gave the Supreme Court of South Carolina an opportunity to review the state's adoption of Section 27 of the Restatement (Second) of Judgments (1982)[1] as cited in South Carolina Property and Casualty

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[1]Restatement (Second) of Judgments (1982) Section 27 provides: "When an issue of fact or law is actually litigated

Insurance Guaranty Association v. Wal-Mart Stores, Inc., 304 S.C. 210, 403 S.E.2d 625 (1991). According to the Supreme Court of South Carolina, collateral estoppel can only bind parties "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment." Id., 403 S.E.2d at 627. Under South Carolina law, the Petitioner's refusal to take the breath test should be admitted in his criminal trial because the State has had no previous opportunity to litigate this issue.

Even if an actual hearing had been held in the Petitioner's case, the Supreme Court of South Carolina correctly held the purpose of such a hearing is significantly different from a pre-trial evidentiary hearing. Therefore, such a hearing should never prevent the State from litigating an evidence issue at trial. Bacote, 503 S.E.2d at 163. A ruling from an administrative officer who does not even consider the introduction of criminal trial evidence cannot collaterally estop the State from litigating the admissibility of the refusal in a subsequent criminal trial for the offense of driving under the influence.

Before considering the Petitioner's claim of collateral estoppel, a reviewing court must first consider the purpose of the South Carolina implied consent statute. With regard to

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and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

suspension of a driver's license after a breath test refusal, the statute provides:

> Upon suspending the license or permit to drive or nonresident operating privilege of any person, or upon determining that the issuance of a license or permit must be denied to the person, as hereinbefore in this section directed, the department shall notify immediately the person in writing and, upon his request, shall afford him an opportunity for a hearing in accordance with the State Administrative Procedures Act, except that the scope of the hearing for the purposes of this section must be limited to the issues of whether the person was placed under arrest, whether the person had been informed that he did not have to take the test but that his privilege to drive would be suspended or denied if he refused to submit to the test, and whether he refused to submit to the test upon request of the officer. The department shall order that the suspension or determination that there should be a denial of issuance either be rescinded or sustained.

S.C. Code Ann. § 56-5-2950(e) (West Group Supp. 1997).

The suspension of a driver's license is a tremendous inconvenience to a driver. The purpose of an administrative hearing about a breath test refusal is to allow the driver a prompt decision as to the implied consent suspension. The promptness of the hearing is critical inasmuch as a driver's license is suspended regardless of whether or not the driver has committed any criminal offense. The issue addressed at the administrative hearing is, therefore, statutorily narrow.

Recognizing the similarities between the instant case and an earlier South Carolina case decided in 1995 and affirmed in 1997, the Supreme Court of South Carolina relied upon Shelton v. Oscar Mayer Foods Corporation, 319 S.C. 81, 459 S.E.2d 851 (Ct.App. 1995), aff'd, 325 S.C. 248, 481 S.E.2d 706 (1997), in reversing the trial judge's application of collateral estoppel. In Shelton, the Court considered whether or not collateral estoppel applies to decisions of the South Carolina Employment Securities Commission (ESC). The analysis in Shelton provides an example to be followed in this case.

The purpose served by an ESC hearing was the first factor considered by the Court. Id., 481 S.E.2d at 708. After considering the statute outlining the public policy of the ESC, the Court concluded the purpose of the administrative hearing was to enable unemployed claimants to obtain prompt decisions regarding benefits from the ESC. Id. According to the Court, this important narrow purpose would be lost if estoppel was permitted as a valid claim to employees or the

ESC. The Court determined collateral estoppel "would result in ESC hearings becoming a forum for lengthy civil litigation of claims relating to an employee's discharge." Id.

The narrow purpose of the implied consent statue is not unlike the ESC statute considered in Shelton. As the Court found with regard to ESC hearings, parties at an implied consent hearing do not and should not appear in anticipation of fully litigating the issues of probable cause for an arrest and other evidence matters related to the sobriety of the driver. The administrative litigation is supposed to be confined to the appropriateness of the ninety-day suspension. If the results of an implied consent hearing are binding on the circuit court, the purpose of the administrative hearing will shift from the appropriateness of a ninety-day suspension period to a more critical pre-trial evidentiary hearing. This change in purpose will change the nature of the hearings. As discussed by the Supreme Court of South Carolina in its Bacote opinion, the State will need to be involved at the hearing stage to protect its interest in future criminal proceedings. The effect will circumvent the very purpose of the quick administrative proceedings. Bacote, 503 S.E.2d at 164.

The Supreme Court of South Carolina is not the first state appellate court to consider this issue. As cited in the Bacote opinion, the Supreme Court of Ohio held that Section 28 of the Restatement (Second) of Judgments (1982) is applicable under these circumstances. State v. Williams, 76

Ohio St. 3d 290, 667 N.E.2d 932 (1996). Following the rules outlined in sections 28(3) and (5) of the Restatement,[2] the Williams court concluded that an administrative hearing designed to determine the appropriateness of a driver's license suspension does not estop the prosecution from litigating the issue at the driver's criminal trial. Id., at 76 Ohio St. 3d at 296. Appellate courts in Illinois and New York have, likewise, declined to apply collateral estoppel in similar

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[2]Restatement (Second) of Judgments (1982) Section 28 (3) and (5), in pertinent part, provide: "Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties in not precluded in the following circumstances: . . . (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them. . . .(5) There is a clear and convincing need for a determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of the adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication of the initial action. Restatement (Second) of Judgments Section 28 (3), (5) (1982).

situations. See People v. Moore, 138 Ill.2d 162, 561 N.E.2d 648 (1990); People v. Lalka, 113 Misc.2d 474, 449 N.Y.S.2d 579 (1982).

Appellate jurisdiction of the Supreme Court of the United States is limited by its own rules.[3] Insomuch as the Supreme Court of South Carolina has correctly applied state law to Petitioner's circumstances, its decision does not involve a question of federal law and is not in conflict with another state court of last resort or a United States court of appeals, there is no compelling reason for this Supreme Court to grant review.

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[3] Sup. Ct. R. 10 (1997).

CONCLUSION

Based on the foregoing arguments and citation of authority, the Respondent, the State of South Carolina, respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

*AMIE L. CLIFFORD, ESQUIRE
Assistant Solicitor

BRENT ALAN GRAY, ESQUIRE
Deputy Solicitor

Office of the Solicitor
300-B California Avenue
Moncks Corner, South Carolina 29461
(843) 719-4529

ATTORNEYS FOR THE RESPONDENT
*Counsel of Record